Nos. 04-805 and 04-814

Supreme Court, U.S.
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In The
Supreme Court of the United States

TEXACO, INC.,

Petitioner,

v.

FOUAD N. DAGHER, *ET AL.*,

Respondents.

SHELL OIL COMPANY,

Petitioner,

v.

FOUAD N. DAGHER, *ET AL.*,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

OPPOSITION TO PETITIONS FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

The question presented by petitioners is not in fact presented in the record of this case, as will be shown. If any question is presented, it is whether the Ninth Circuit correctly found the per se rule applicable to an agreement between competitors on the price at which their respective brands of gasoline would be sold by a joint venture.

LIST OF RESPONDENTS

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Quang Truong
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Nassim Hanna

RESPONDENTS' RULE 29.6 DISCLOSURE

Respondents state that none of the respondents has a parent corporation and that no publicly held company owns ten percent or more of any of the respondents' stock.

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STATEMENT OF THE CASE

Respondents submit this brief in opposition to the Petitions for a Writ of Certiorari filed by Shell Oil Company ("Shell") and Texaco, Inc. ("Texaco") (collectively "the Oil Companies"). The petitions of Shell and Texaco should be denied because the question presented by Shell and Texaco does not exist and is not presented in the record of this case. The Ninth Circuit never ruled that the Oil Companies' joint ventures could not set the prices at which they sold their own products. Rather, the Ninth Circuit held that sufficient evidence existed to allow a jury to find that Shell and Texaco set prices for their joint ventures, and that such price-fixing by Shell and Texaco could constitute *per se* unlawful price-fixing.

The decision of the Ninth Circuit is fully consistent with the law of this Court and other circuits on the issue of when a price-fixing agreement by competitors engaged in a joint venture constitutes a *per se* violation of Section 1 of the Sherman Act, 15 U.S.C. § 1.

To attract this Court's attention, Shell and Texaco have created a question that does not exist, and have misstated or ignored crucial aspects of the Ninth Circuit's decision, which demonstrate that there is nothing presented by this case that is worthy of this Court's attention.

First, Shell and Texaco incorrectly state that this case presents an issue of the ability of a joint venture to price its own products without running afoul of Section 1. They ignore the following two key factual findings made by the Ninth Circuit: (1) the evidence is sufficient to allow a jury to find that the decision to fix the same prices for the Shell and Texaco brands was made by Shell and Texaco themselves, and not by the management of their joint ventures

(Appendix at 19a)[1]; and (2) the evidence was also sufficient to allow a jury to find that the decision by Shell and Texaco to fix prices had absolutely nothing to do with the purposes for which they formed their joint ventures or any cost savings or efficiencies associated with those ventures. (Appendix at 23a.)[2]

Thus, in order to frame their question presented, Shell and Texaco ask this Court to assume propositions as to which the Ninth Circuit expressly found disputed issues of fact requiring trial. The question Shell and Texaco claim to present to this Court in their petitions for certiorari simply does not exist, because the Ninth Circuit expressly found that the price-fixing at issue was not the result of action "by a single economic entity," but was "a decision

[1] Appendix citations in this brief in opposition are to the Appendix in the Petition of Texaco. The Ninth Circuit specifically found, at footnote 11 of its decision, "Thus, contrary to our dissenting colleague's understanding, the pricing decision was not made by a single economic entity. . . . At this stage of the litigation, we are required to draw all reasonable inferences in favor of the plaintiffs. Viewing the evidence in that light, there is at least a triable issue of fact as to whether Texaco and Shell agreed in advance to charge the same price for their two distinct gasoline brands as an initial operating requirement of the Alliance. The decision by Texaco and Shell to include in their joint ventures a unified pricing scheme was not a decision made by a single economic entity – it was a decision made by competitors."

[2] "The defendants have thus far failed to offer any explanation of how their unified pricing of the distinct Texaco and Shell brands of gasoline served to further the ventures' legitimate efforts to produce better products or capitalize on efficiencies. Nor does the record contain facts sufficient to warrant our drawing any such inference. To the contrary, the record before us reveals that the Alliance never considered unified pricing to be relevant to product improvement or efficiency gains. As one oil company executive explained, all of the anticipated cost savings, which were calculated prior to the formation of the joint ventures, had 'nothing to do with pricing.'"

made by competitors" (Appendix at 19a), and was further wholly unrelated to the purpose or efficiencies of the subject joint ventures (Appendix at 23a).

Finally, this Court should deny the petitions because the analysis employed by the Ninth Circuit is entirely consistent with that employed by this Court and other circuits in analyzing whether price-fixing in a joint venture context is ancillary to the ventures and thereby lawful, or naked and thereby *per se* unlawful. The Ninth Circuit's decision presents a conventional and unremarkable application of a principle of antitrust law under Section 1 fully in accordance with more than a century of antitrust decisions in this Court and other circuits. The Ninth Circuit's decision creates no circuit split, no conflict with any decision of this Court, and no remarkable or unusual application of law meriting review by this Court.

Expressly noting this Court's admonition in *Timkin Roller Bearing Co. v. United States*, 341 U.S. 593, 598 (1951) (" . . . [A]greements between legally separate persons and companies to suppress competition among themselves and others [cannot] be justified by labeling the project a 'joint venture'") (Appendix at 17a), the Ninth Circuit held, "Thus, whether the *per se* rule applies to a legitimate joint venture's allegedly anticompetitive conduct depends first and foremost on a determination of whether the specific restraint is sufficiently important to attaining the lawful objectives of the joint venture that the anticompetitive effects should be disregarded." (Appendix at 22a.) This is nothing more than a garden variety application of the rule condemning naked restraints, while allowing ancillary restraints, as articulated more than a century ago by Judge Taft in *United States v. Addiston Pipe & Steel Co.*, 85 F. 271, 280-81 (6th Cir. 1898), *modified and aff'd*, 175

U.S. 211 (1899). *See* H. Hovenkamp, *XI Antitrust Law*, Section 1908, at 228 (1998). If anyone seeks to change well-established law here, it is Shell and Texaco, not the Ninth Circuit. Accordingly, the petitions should be denied.

A. The Oil Companies' Formation Of and Control Over The Alliance

In March, 1996, Shell and Texaco began discussions regarding consolidating Shell's and Texaco's "downstream" assets in the United States.[3] Star Enterprise ("Star"), a joint venture of Saudi Refining, Inc. ("SRI") and Texaco doing business in the eastern United States, eventually joined the discussions. These discussions culminated on January 1, 1998, with the formation of Equilon, which combined the Shell and Texaco refining and marketing operations in the western United States, and, on July 1, 1998, with the formation of Motiva, which combined the refining and marketing operations of Shell, Texaco, and SRI in the eastern United States. (Appendix at 3-4a.) The Oil Companies have generally referred to the overall combination of Equilon, Motiva and related service companies as "the Alliance." (Appendix at 4a, n.2.)

Prior to the formation of the Alliance, competitors in the United States gasoline refining and marketing industry included, among others, six major oil companies (Shell, Texaco, Exxon, Mobil, Chevron, and Amoco), each of which had a relatively stable market share in the range of six to

[3] In the oil industry, the refining of crude oil into gasoline and other products and the marketing of finished products are referred to as "downstream operations." "Upstream operations," in contrast, consist of exploring for and producing crude oil. (Appendix at 3a, n.1.)

eight percent. Shell, with a market share of eight percent, had annual revenues of $18.3 billion; Texaco, with a share of seven percent, had annual revenues of $18 billion. Prior to the formation of the Alliance, the Oil Companies' refining and marketing businesses were profitable, although the Oil Companies were dissatisfied with their rates of return. Even in the absence of the Alliance, each of the Oil Companies had planned to implement cost reductions in order to improve competitiveness and profitability in its downstream businesses. The Oil Companies also believed, however, that in the absence of a combination such as the Alliance, any cost savings they might achieve independently would not result in a sustainable increase in profitability, but rather, would be competed away. The Oil Companies' purpose in negotiating the formation of the Alliance was to end competition between Texaco, Shell, and SRI in the refining and marketing of gasoline in the United States and to increase the profitability of their refining and marketing businesses.

The Alliance was not a merger. Shell, Texaco, and SRI continued to exist as they had before the Alliance except for the specific downstream assets contributed to the Alliance. The Oil Companies were competitors before the Alliance, and they continued to be world-wide competitors after they formed the Alliance, except as specifically provided otherwise in written non-compete agreements. The Oil Companies excluded from the Alliance all of their international refining and marketing operations, thus limiting the Alliance's operations to the United States.

Perhaps most significantly, the Oil Companies also excluded the Shell and Texaco brand names and trademarks from the assets contributed to the Alliance, with

the ownership of the brands remaining with Shell and Texaco, respectively. The Alliance marketed the Shell and Texaco brands of gasoline under license agreements with Shell and Texaco. The license agreements were subject to "Brand Management Protocol" agreements, which required that both the Shell brand and the Texaco brand would be preserved, that the brands would be treated equally, and that neither brand would receive preferential treatment over the other brand. After the formation of the Alliance, use and management of the Shell and Texaco brands by Equilon and Motiva were subject to the oversight of the Brand Management Council, consisting of representatives of Shell and Texaco. Functions of the Brand Management Council included developing criteria and standards by which to measure performance of the brands and also ensuring that the Shell and Texaco brands received equal treatment.

At the time of its formation, the Alliance had a market share of approximately 15 percent of gasoline sales in the United States, double the size of its next largest competitor. In 39 states, the Alliance had a market share of more than 10 percent; in 15 of those states, its share exceeded 20 percent; in three states, the Alliance's market share was more than 30 percent. On the West Coast, its market share exceeded 25 percent.

The governance of the Alliance rested with Members Committees consisting of representatives of each of the Oil Companies. The Members Committee for Equilon consisted of four representatives from Shell and three from Texaco; the Members Committee for Motiva consisted of two members each for Shell, Texaco, and SRI. The Equilon Members Committee met six times per year; the Motiva

Members Committee met four times per year. The Members Committee representatives reported to executives at the Oil Company parents.

B. The Oil Companies' Pricing of Shell and Texaco Brand Gasoline

The Shell and Texaco brands of gasoline are separate and distinct products, each with its own unique package of additives. Moreover, the two brands are marketed to different customer segments. For example, Texaco customers tend to be more blue-collar and rural than Shell customers, who are more affluent and urban. Notwithstanding the differences between Shell and Texaco gasoline, Equilon and Motiva, within several months after their formation, implemented a practice of charging the same price for the Shell and Texaco brands of gasoline in each of the pricing areas into which Equilon and Motiva had divided their geographic spheres of operation. To that end, Equilon and Motiva developed a joint program called the "Strategic Marketing Initiative," which called for price-fixing as a means of "price optimization" and was reviewed and approved by the Members Committees of both Equilon and Motiva. As a result, price competition between the Shell and Texaco brands of gasoline ended.

Pursuant to the Strategic Marketing Initiative, the Oil Companies were able to increase prices to independent service station operators at a time when crude oil prices were falling to historic lows. For example, on September 1, 1998, the price of crude oil was stable at approximately $12 per barrel before declining to under $10 per barrel during January and February of 1999. During this same period, Equilon raised its prices for Shell and Texaco

gasoline from $.62 per gallon to $1.02 per gallon in Los Angeles and from less than $.60 per gallon to more than $.90 per gallon in Portland and Seattle. In the Chicago area, Motiva raised its prices from $.55 per gallon to $.75 per gallon. Generally, such increases occurred in areas where Equilon and Motiva had larger market shares, especially on the West Coast.

No efficiencies, cost savings, or synergies resulted from the Oil Companies' fixing of prices for the Shell and Texaco brands of gasoline. Cost savings both anticipated and realized from the formation of Equilon and Motiva resulted from the elimination of redundant operations, through layoffs, elimination of positions, and closing of offices, as well as by avoiding capital expenditures that the Oil Companies would have made had they continued as competitors. None of the cost savings were passed on to consumers in the form of price reductions. The pricing policies that are at issue in this case were not necessary to attain any of the cost savings or efficiencies that the Oil Companies expected or achieved from the formation of Equilon and Motiva. Nor did the formation of the Alliance result in the development of any new products or innovations that the Oil Companies could not have come up with individually, acting as competitors.

REASONS FOR DENYING THE WRIT

In an attempt to justify the application of the rule of reason rather than the *per se* rule against price-fixing, the Oil Companies characterize the pricing decisions at issue as decisions made by joint ventures in connection with the marketing of their products. This mischaracterizes the

record. In fact, the agreement to equalize the price at which the Alliance marketed the Shell and Texaco brands of gasoline was entered into and enforced by competitors, Shell and Texaco. As the Ninth Circuit concluded, "The decision by Texaco and Shell to include in their joint venture a unified pricing scheme was not a decision made by a single economic entity – it was a decision made by competitors." Shell and Texaco's pricing agreement was not necessary for the Alliance to be able to market gasoline, nor did it produce any efficiencies. As such, it was properly characterized as a "naked" restraint of trade and, based upon more than a hundred years of consistently applied antitrust jurisprudence, illegal *per se*.

I. THE PREMISE OF THE OIL COMPANIES' ARGUMENT – THAT THE PRICING RESTRAINT AT ISSUE WAS ESTABLISHED BY A JOINT VENTURE – IS CONTRARY TO THE RECORD

At issue in this case is the agreement of Shell and Texaco, as licensors of the competing Shell and Texaco brands of gasoline, that those brands would be sold by the Alliance at the same price. The Oil Companies' attempt to characterize this as a pricing decision made by the joint ventures is contrary to the record. For this reason, the question presented, as set forth in Oil Companies' respective petitions, is not an accurate statement of any legal issue presented by the Ninth Circuit's decision in this case.

To bolster their unfounded claim that the Ninth Circuit's decision improperly interferes with the right of the Alliance to price its own products, the Oil Companies ignore or misstate a number of key facts firmly established by the evidence of record. First, they ignore or misstate

their own significant continuing role in and control over the joint ventures during and after their formation. Shell and Texaco did not vanish and become absorbed in their new ventures, Equilon and Motiva. They continued to exist and compete with each other everywhere else in the world except the United States.[4] Here, they maintained not only their own separate corporate identities, but also their ownership and control over the Shell and Texaco brands of gasoline.[5] Equilon and Motiva were subject to Brand Management Protocols, under which Shell and Texaco licensed their brands while retaining control over how the Alliance could market the brands.[6] The brand management protocols further provided that the Alliance would treat the Shell and Texaco brands equally, and that neither brand would receive preferential treatment over the other.[7] Under their agreements, Shell and Texaco both maintained the ability to return to individual sales and marketing of their respective brands, pursuant to provisions in the joint venture agreements allowing for dissolution of the venture at any time by mutual consent or, after five years, by unilateral dissolution on two years' advance notice.[8]

Shell and Texaco agreed to price the Shell and Texaco brands of gasoline at the same price even though the two brands were maintained as distinct products, with each brand having its own unique chemical composition, trademarks, and marketing strategy, competing for customers

[4] Appendix at 5a.
[5] *Id.*
[6] *Id.*
[7] *Id.*
[8] *Id.*

"at the pump."[9] After the establishment of the Alliance, the Shell and Texaco brands continued to be targeted at different customer segments.[10]

Shell and Texaco agreed even before the ventures came into existence to eliminate all competition between their brands of gasoline, including, certainly by implication if not expressly, price competition. When the Alliance ultimately began marketing the two brands, their use and management of the brands were subject to the oversight of the Brand Management Council, which consisted of representatives of Shell and Texaco. The Brand Management Council's functions included monitoring that the Shell and Texaco brands were receiving equal treatment. Requiring equal treatment, by its very nature, precluded all competition between the brands, including price competition.

In addition, the overall management of Equilon and Motiva rested with Members Committees consisting of representatives of each of the participating oil companies. All venture business was required to be conducted "subject to direction by, and in accordance with policies, business plans and budgets approved by, the members, acting by and through the Members Committee." And it was, including specifically the decision to charge the same price for the Shell and Texaco brands in the same trade area. This practice was implemented by the Alliance under its "Strategic Marketing Initiative," which was reviewed with and approved by the Members Committees of Equilon and Motiva, *i.e.*, Shell and Texaco executives.

[9] *Id.* at 6a-7a.
[10] *Id.* at 7a.

Thus, the price-fixing challenged in this action was clearly a decision of Shell and Texaco in their exercise of control over the operations of the venture, not an action of the venture itself.

In addition, the admissions of executives of Shell and Texaco established that the fixing of prices for the Shell and Texaco brands had absolutely no relationship with any efficiencies or cost-savings either anticipated or realized from the joint ventures.[11] Thus, the price-fixing was in no way reasonably necessary to further the legitimate aims of the joint venture, which were ostensibly cost reductions from combining the Shell and Texaco refining and marketing operations.

Based on these facts, the Ninth Circuit quite correctly rejected the claim that the pricing decision that is at issue here was made by a single economic entity. On this point the court found:

> At this stage of the litigation, we are required to draw all reasonable inferences in favor of the plaintiffs. Viewing the evidence in that light, there is at least a triable issue of fact as to whether Texaco and Shell agreed in advance to charge the same price for their two distinct gasoline brands as an initial operating requirement of the alliance. The decision by Texaco and Shell to include in their joint ventures a unified pricing scheme was not a decision made by a single economic entity – it was a decision made by competitors.[12]

[11] Appendix at 23a.

[12] Appendix at 19a.

Thus, the factual predicate for the issue claimed to be presented by the Oil Companies is unsupported by the record, and indeed directly contradicted by the Ninth Circuit's decision, which found sufficient evidence for a jury to conclude that the pricing decision at issue was made by Shell and Texaco, not by their joint ventures. The Ninth Circuit's finding renders the Oil Companies' petitions little more than impermissible requests for this Court to render an advisory opinion on a point the Ninth Circuit never decided, and in fact rejected, ruling that whether Shell and Texaco agreed to fix prices was a disputed question of fact requiring determination by a jury.

II. THE NINTH CIRCUIT'S DECISION IS CONSISTENT WITH AND, INDEED, COMPELLED BY, THIS COURT'S PREVIOUS DECISIONS CONDEMNING NAKED PRICE RESTRAINTS AS ILLEGAL *PER SE*

A. This Court Has Consistently Condemned Naked Restraints on Price Competition as Illegal *Per Se*

The Ninth Circuit's decision follows directly from this Court's precedents regarding the application of the *per se* rule to naked restraints on price competition. Cases on which the Ninth Circuit properly relied include *Timken Roller Bearing Co. v. United States*, 341 U.S. 593 (1951); *Broadcast Music, Inc. v. CBS, Inc.*, 441 U.S. 1 (1979); *NCAA v. Bd. of Regents*, 468 U.S. 85 (1984); and *Citizens Publ'g Co. v. United States*, 394 U.S. 121 (1969).

As this Court found in *Timken*, joint ventures do not enjoy any particular immunity from the antitrust laws.

See Timken, 341 U.S. 593, 598 (1951) ("Nor do we find any support in reason or authority for the proposition that agreements between legally separate persons and companies to suppress competition among themselves and others can be justified by labeling the project a 'joint venture.'"). This Court's teaching in *Broadcast Music* and *NCAA* shows that, even when competitors have, to some extent, integrated their operations in connection with the formation of a joint venture, it is still necessary to examine the relationship between the joint venture and any agreements that restrain competition.

In *Broadcast Music*, the Supreme Court declined to apply *per se* treatment to blanket licensing of musical works. The Court found the blanket license not to be a naked restraint "with no purpose except stifling of competition," but rather to accompany "the integration of sales, monitoring, and enforcement against unauthorized copyright use." 441 U.S. at 19-20. The Court noted, "The substantial lowering of costs, which is of course potentially beneficial to both sellers and buyers, differentiates the blanket license from individual use licenses." 441 U.S. at 21. Here, of course, the evidence is undisputed that the price-fixing at issue involved no reduction of costs whatsoever, and was not even claimed to be related to the cost reductions justifying the Oil Companies' ventures. The Supreme Court also observed in *Broadcast Music*, "Joint ventures and other cooperative arrangements are also not usually unlawful, at least not as price-fixing schemes, *where the agreement on price is necessary to market the product at all.*" 441 U.S. at 23 (emphasis added). That is definitely not the case here, where no new product was involved; where for eight months after its formation Equilon was able to market the Shell and Texaco brands

without fixing their prices; and where no one has claimed price-fixing to be necessary to market the two brands.[13]

Significantly, in *NCAA v. Board of Regents*, 468 U.S. 85 (1984), this Court explained *Broadcast Music* by observing that price-fixing by joint ventures can escape *per se* treatment only when it makes "possible a new product by reaping otherwise unattainable efficiencies," 469 U.S. at 113; or when it "may be so efficient that it will increase sellers' aggregate output and thus be procompetitive." 468 U.S. at 103. Neither condition exists here, where the ventures themselves admittedly produced no new products, certainly not the products as to which Shell and Texaco fixed prices, the branded gasolines, and there is no evidence whatsoever of increased output resulting from the price-fixing.

Even more important, in *NCAA*, the Supreme Court quoted with approval the following comments of Professor Areeda, which clearly demonstrate the *per se* illegality of the restraint at issue here:

> . . . joint buying or selling arrangements are not unlawful *per se*, but a court would not hesitate in enjoining a domestic selling arrangement by which, say, Ford and General Motors distributed their automobiles nationally through a single selling agent. Even without a trial, the judge will know that these two large firms are major factors in the automobile market, that such joint selling

[13] The Oil Companies belatedly made the unfounded claim that Robinson-Patman compliance prompted their price-fixing of the Shell and Texaco brands, a position the Ninth Circuit properly found to be without merit and no defense to their price-fixing. (Appendix at 24-26a.)

> will eliminate important price competition between them, that they are quite substantial enough to distribute their products independently, and that one can hardly imagine a procompetitive justification actually probable in fact or strong enough in principle to make this particular joint selling arrangement "reasonable" under Sherman Act § 1. The essential point is that the rule of reason can sometimes be applied in the twinkling of an eye.

468 U.S. at 110, 39, quoting P. Areeda, *The "Rule of Reason" in Antitrust Analysis: General Issues 37-38* (Federal Judicial Center, June 1981) (parenthetical omitted). The four conditions noted by Professor Areeda and quoted by the Supreme Court all apply to the Shell and Texaco ventures here and mandate *per se* illegality. Hence, under *BMI*, as well as *NCAA*, the Ninth Circuit's decision in this case scrupulously follows Supreme Court precedent.

Citizen Publ'g, which neither Texaco nor Shell effectively distinguishes, is even more on point. In that case, the Supreme Court found a joint venture between two Arizona newspapers to involve *per se* antitrust violations "plain beyond peradventure," 395 U.S. at 135, when the newspapers, retaining their corporate identities and separate news and editorial departments, combined their remaining operations, jointly fixed subscription and advertising rates, pooled profits, and agreed not to compete with each other. Just like the combining newspapers in *Citizen Publ'g*, here Shell and Texaco retained their corporate identities, as well as their exploration and production operations, while agreeing to fix prices for the gasoline marketed by their combination in the United States. The Ninth Circuit's decision here quite properly recognized the controlling weight of *Citizen Publ'g*, and

rejected the unpersuasive efforts of the Oil Companies to distinguish it.[14]

B. There Is No "Circuit Split"

In seeking to justify review by this Court, the Oil Companies attempt to manufacture some inconsistency between the Ninth Circuit's decision and decisions in other circuits. In fact, a review of the decisions that the Oil Companies rely on shows that the circuits, consistent with the decisions of this Court cited above, have repeatedly recognized the crucial distinction between ancillary restraints, which are subject to the rule of reason, and naked restraints, which are illegal *per se*. The Oil Companies' claims regarding the need to resolve a split among the circuits are without merit.

Nat'l Bancard Corp. v. VISA U.S.A., Inc., 779 F.2d 592 (11th Cir. 1986), one of the cases cited by the Oil Companies as evidence of a circuit split, is instructive. In that case, the plaintiff challenged under Sherman Act § 1 certain rates established for interbank credit card transactions. There the Eleventh Circuit applied this Court's analysis, as reflected in *Broadcast Music*, precisely in the way the Ninth Circuit did in this case, stating, "[*Broadcast Music's*] underlying teaching therefore appears to be that courts should look to whether the restraint at issue potentially could create an efficiency enhancing integration to which the restraint is ancillary. In other words, the issue is whether the price fixing '*achieves purposes unrelated to price formation.*'" 779 F.2d at 599 (emphasis in original, citations omitted). The court

[14] Appendix at 17a-20a.

went on to note, "Thus, if interchange reimbursement could be left to individual negotiation without threatening the existence and functioning of the VISA system, any effort to impose a set fee would be properly categorized as *per se* unreasonable. The question is whether the restraint is necessary for the existence of the product." *Id.* at 601.[15] Similarly, in *Augusta News Co. v. Hudson News Co.*, 269 F.3d 41 (1st Cir. 2001), another of the cases cited by the Oil Companies, the court found that the price restraint there, like the one in *Broadcast Music*, related to a joint offering that none of the participants in the venture could offer on its own. 269 F.3d at 48. *See also Polk Bros., Inc. v. Forest City Enterprises, Inc.*, 776 F.2d 185, 188-89 (7th Cir. 1985) ("A court must distinguish between 'naked' restraints, those in which the restriction on competition is unaccompanied by new production or products, and 'ancillary' restraints, those that are part of a larger endeavor whose success they promote," *citing NCAA*).

The situation presented by this case is, of course, very different from the one at issue in the cases cited by the Oil Companies. The agreement between Shell and Texaco to equalize the prices at which their respective brands of gasoline would be sold did not relate to any new, joint product; it related to the very same brands of gasoline that, before the implementation of the pricing restraint, competed with one another. The agreement was not necessary for the Alliance to be able to sell gasoline. To the contrary, as the Ninth Circuit observed, "[T]he

[15] *Cf.* Appendix at 16a, citing *Broadcast Music* for the proposition that "joint ventures are not 'usually unlawful, at least not . . . where the agreement on price is necessary to market the product at all.'" (Emphasis in original).

defendants have stressed that, in addition to the differences in the product themselves, the gasolines marketed under the Texaco and Shell labels have different reputations and customer bases. It thus seems likely that independent price analysis would result, at least in some circumstances, in the rational decision to sell the different brands at different prices."[16] Finally, neither Shell nor Texaco has ever claimed that the pricing agreement was related to any efficiencies produced by the venture. Consistent with the decisions of this Court and every circuit, such a restraint is correctly characterized as "naked" and subject to the *per se* rule.

III. THE NINTH CIRCUIT'S DECISION DOES NOT THREATEN LEGITIMATE AGREEMENTS NECESSARY TO THE OPERATION OF JOINT VENTURES

In their petitions, the Oil Companies make the wholly unfounded and alarmist claim that the Ninth Circuit's decision has put in question and surrounded with doubt the future formation and operation of joint ventures in this country, and thereby threatens an important sector of the United States economy. This goes beyond hyperbole in that it contains not a grain of truth. There is nothing new, unexpected, or revolutionary in the lower court's decision, which rests on the most fundamental and well-established principles of antitrust law and analysis. If anything, the decision has made more secure the bedrock principles that guide a determination of when joint venture partners have transgressed into an area of *per se* illegality.

[16] Appendix at 23a.

The guiding principle of the Ninth Circuit's opinion is clearly stated:

> It is not the case, however, that the mere existence of a *bona fide* joint venture means that participating companies may use the enterprise to do anything they please with full immunity from *per se* analysis under § 1, including price fixing. As the district court correctly stated when ruling on the motion to dismiss, the issue with respect to legitimate joint ventures is whether the price fixing is "naked" (in which case the restraint is illegal) or "ancillary" (in which case it is not). *Accord* XI Hovenkamp ¶1908, at 228-30 (arguing that a "restraint does not qualify as 'ancillary' merely because it accompanies some other agreement that is itself lawful" and that "a restraint is not saved from the 'naked' classification simple because it is included in some larger joint venture arrangement that is clearly efficient").[17]

Significantly, the cited section of the Hovenkamp treatise premises its discussion on the rule formulated by Judge Taft in *United States v. Addyston Pipe & Steel Co.*, 85 F. 271, 280-81 (6th Cir. 1898), modified and affirmed, 175 U.S. 211 (1899), articulating the distinction between naked and ancillary restraints. H. Hovenkamp, *XI Antitrust Law*, ¶1908, at 228 (1998). Thus, the principle guiding the decision has been a cardinal rule of antitrust law for well over a century. Since 1899, the distinction between naked and ancillary restraints has served as a touchstone for joint ventures in determining the conduct

[17] Appendix at 16a.

that will be subject to *per se* illegality. For the Oil Companies to argue that the Ninth Circuit's decision did anything new or unprecedented in following this rule is absurd.

Moreover, the decision's actual application of this guiding principle is entirely unexceptionable and in conformance with precedent. According to the Ninth Circuit, even if the Oil Companies' ventures themselves were not anticompetitive or formed with the intent to destroy competition, the relevant inquiry is "whether the defendants' conduct – setting one, unified price for both the Texaco and Shell brands of gasoline instead of setting each brand's price independently on the basis of normal market factors – is reasonably necessary to further the legitimate aims of the joint venture."[18]

In making this analysis, the Ninth Circuit did nothing more than follow the reasoning of *Broadcast Music*, "(approving an otherwise invalid price restraint only because 'the agreement on price is necessary to market the product at all')," and *NCAA v. Board of Regents*.[19] Accurately summarizing the record, the court concluded, "The defendants have thus far failed to offer any explanation of how their unified pricing of the distinct Texaco and Shell brands of gasoline served to further the ventures' legitimate efforts to produce better products or capitalize on efficiencies."[20] "Indeed," the court noted, "the record is close to establishing that the price fixing scheme was sufficiently unrelated to accomplishing the legitimate objectives of the joint venture

[18] Appendix at 21a.

[19] *Id.*

[20] Appendix at 23a.

as to justify granting the plaintiffs' motion for summary judgment."[21] There is absolutely nothing new or unorthodox in the Ninth Circuit's treatment of the law and the evidence, and hence nothing to create fear, uncertainty, or doubt in the minds of companies contemplating or operating legitimate joint ventures.

Finally, the Ninth Circuit convincingly puts to rest the Oil Companies' arguments that its decision somehow blocks joint ventures from setting prices for their products.

> We have held that the Sherman Act's *per se* rule applies when the defendant fails to demonstrate a sufficient relationship between the price fixing scheme and furthering the legitimate aims of the joint venture – a relationship that justifies the otherwise prohibited price restraints. Thus far in this litigation, the defendants have failed to produce sufficient evidence demonstrating that the price fixing scheme was ancillary rather than naked and, thus, that they are entitled to summary judgment.[22]

The Oil Companies here are trying to turn their own failure of proof into a new rule of law, directly in conflict with all prior decisions in this area, which will confer on joint ventures a broad antitrust immunity they have never enjoyed and do not deserve. The Ninth Circuit's decision does not change the rules. The rules have been what they are since 1899. Joint venturers have only to look at a century of consistently decided cases and the Ninth Circuit's decision to know what they can and cannot do.

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[21] *Id.*, n.16.

[22] *Id.* at 27a.

CONCLUSION

The Ninth Circuit's decision in this case presents the straightforward application of well-established precedent holding naked restraints on trade to be illegal *per se*. This case does not present any new or novel issues warranting this Court's review. When the Oil Companies petitioned for *en banc* rehearing in the Ninth Circuit, "no judge ... requested a vote on whether to rehear the matter *en banc*." (Appendix at 1a.) The Oil Companies now come before this Court presenting a question that was neither considered nor decided by the Ninth Circuit, which found the evidence to be contrary to the position espoused by the Oil Companies. Accordingly, respondents respectfully request that the petitions of Shell and Texaco for a writ of certiorari be denied.

Respectfully submitted,

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